S & C Excavating Co., Inc. *and* Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 6–CA–26571

November 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

Upon a charge filed by Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union) on July 25, 1994, the General Counsel of the National Labor Relations Board issued a complaint on September 8, 1994, against S & C Excavating Co., Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On October 25, 1994, the General Counsel filed a Motion for Summary Judgment. On October 27, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, ''all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board.'' Section 102.20 also states that an answer should specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state.

The undisputed allegations in the Motion for Summary Judgment disclose that the Regional Attorney, by letter dated September 26, 1994, notified the Respondent that unless an answer was received by the close of business on the third day following the Respondent's receipt of the letter, or unless an extension of time for filing the answer was granted, a Motion for Summary Judgment would be filed. This letter was returned to the Regional Office marked ''unclaimed.'' In the interim, on September 23, 1994, the Regional Office received from the Respondent a handwritten note on the last page of the complaint. The note stated that the Respondent has retained an attorney to file a Chapter 7 bankruptcy petition. By letter dated September 28, 1994, the Respondent was advised that the handwritten note did not satisfy the obligation to file an answer in accordance with the Board's Rules and Regulations. The Respondent received this letter, but no answer has been filed and no extension of time to file an answer has been sought.

The Respondent's handwritten note does not constitute a proper answer to the complaint because it does not address the facts alleged in the complaint. Furthermore, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within 11 U.S.C. § 362(b)(4) and (5), the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. *Phoenix Co.*, 274 NLRB 995 (1985). Therefore, even if the handwritten note constituted an adequate answer to the complaint, the Respondent has raised no issues warranting a hearing.

In the absence of good cause being shown for the failure to file a proper and timely answer, and in the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation with an office and place of business in Canfield, Ohio, and jobsites in Greentree and McKeesport, Pennsylvania, has been engaged in business as a contractor in the construction industry. During the 12-month period ending June 30, 1994, the Respondent, in the course and conduct of its business operations, provided services valued in excess of $50,000 in States other than the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The employees of the Respondent performing the work described in article V of the collective-bargaining agreements described below constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

About May 23, 1994, the Respondent, an employer engaged in the building and construction industry, orally extended recognition to the Union as the exclusive

collective-bargaining representative of the unit employees, and about May 23, 1994, orally entered into a collective-bargaining agreement effective by its terms for the period June 1, 1990, to May 31, 1994, which agreement was executed by the Respondent on June 8, 1994. Since about May 23, 1994, pursuant to the collective-bargaining agreement described above, the Union has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Recognition has been embodied in successive collective-bargaining agreements executed by the Respondent, the most recent of which is effective for the period from June 1, 1994, to May 31, 1998. For the period from May 23, 1994, to May 31, 1998, the Union, based on Section 9(a) of the Act, has been, and is, the limited exclusive collective-bargaining representative of the employees in the unit.

B. *The Refusal to Bargain*

Article VI of the collective-bargaining agreements described above provides for the payment of fringe benefits to pension, medical and annuity and savings funds for the benefit of the unit. Since about May 24, 1994, the Respondent has failed to continue in effect all the terms and conditions of the agreements described above by failing to pay fringe benefits to the funds as required by article VI of the collective-bargaining agreements.

Article IV of the collective-bargaining agreements described above provides for the payment of wages to unit employees. Since about June 28, 1994, the Respondent has failed to continue in effect all the terms and conditions of the agreements described above by failing to pay wages as required by article IV of the collective-bargaining agreements.

The Respondent engaged in this conduct without the Union's consent. The terms and conditions of employment described above are mandatory subjects for the purpose of collective bargaining. By this conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its unit employees, and has thereby been engaging in unfair labor practices within the meaning of Section 8(d) and Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing to pay fringe benefits to the pension, medical and annuity and savings funds, and by failing to pay wages, as required by the collective-bargaining agreements, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the pension, medical and annuity and savings funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to pay unit employees contractual wages, we shall order the Respondent to make the unit employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In light of the Respondent's representations in its handwritten note that the Respondent may have filed a bankruptcy petition, we shall also provide for mail notices to employees.

ORDER

The National Labor Relations Board orders that the Respondent, S & C Excavating Co. Inc., Canfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the limited exclusive collective-bargaining representative of the unit employees by failing to make required contributions to the pension, medical and annuity and savings funds, and by failing to pay contractually required wages to unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit the delinquent contributions to the pension, medical and annuity and savings funds, including any additional amounts due the funds, and reimburse the unit employees for any expenses ensuing from the

Respondent's failure to make the required payments, in the manner set forth in the remedy section of the decision.

(b) Make all contractually required wage payments, in the manner set forth in the remedy section of the decision.

(c) On request, bargain with Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the limited exclusive collective-bargaining representative of the employees performing the work described in article V of the collective-bargaining agreements.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Canfield, Ohio, and mail to the Union and to all unit employees, copies of the attached notice marked ''Appendix.''[1] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Union as the limited exclusive collective-bargaining representative of our unit employees by failing to make required contributions to the pension, medical and annuity and savings funds, and by failing to pay contractually required wages to unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit the delinquent pension, medical and annuity and savings fund contributions, including any additional amounts due the funds, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL make all contractually required wage payments, with interest.

WE WILL, on request, bargain with Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the limited exclusive collective-bargaining representative of the employees performing the work described in article V of our collective-bargaining agreements.

S & C EXCAVATING CO., INC.